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No. 89-1508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COLORADO INTERSTATE GAS COMPANY,
Petitioner,
v.
NGPL GAS PIPELINE COMPANY OF AMERICA,
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES

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PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES

On May 14, 1990, this Court solicited the views of the United States concerning the two issues presented in the petition. After five months, the Solicitor General has expressed the view that both legal issues, which arise directly out of the opinion of the Tenth Circuit, are important. See Br. 15 n.18 ("There is considerable force to petitioner's criticism . . . of the court of appeals' reliance —in the preemption context—on the need for 'room to breathe' "); *id.* at 20 ("there is confusion among the lower courts regarding the standards for attempted monopolization under Section 2 and courts continue to have difficulties in distinguishing between business torts and actionable conduct that threatens competition"). Obviously, great deference is owed to these views because they represent the considered judgment of the Solicitor General and the Antitrust Division of the Justice Department as to the significance of the court of appeals' pronouncements on these two important matters in which they have programmatic and litigating interests.

Notwithstanding the apparent worthiness of the issues presented for review, the Solicitor General ultimately does not urge the Court to grant the petition. The government argues instead that, even though the court of appeals' actual opinion is largely indefensible, the language chosen by that court was not necessary to the court's holdings. The Solicitor General, however, is in no better position than is this Court to read the opinion below and determine what it decides; accordingly, the Solicitor General's view on what issues are actually posed by a particular opinion are not entitled to special deference. The Court therefore should accept the government's view that both issues presented are important and read the Tenth Circuit's opinion for itself to decide which issues are in fact presented.

I.

At least once in recent years, this Court has not found the Solicitor General's reluctance to support an antitrust petition dispositive. In *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), the FTC was compelled to file its petition for certiorari under its own litigating authority because the Solicitor General refused to support the petition. See Pet. 1 n.1 in No. 84-1809 (filed May 17, 1985). The facts in that case were certainly unusual, and yet the Court granted the petition and established the bedrock principle under Section 1 that proof of anticompetitive effects eliminates the need to prove market power. Because this case presents an opportunity for the Court to extend that principle to Section 2 and to resolve the longstanding conflict in the circuits over the elements of attempted monopolization, this Court should grant the petition.

1. The Solicitor General's lead arguments on the antitrust question seriously mischaracterize the court of appeals' opinion and the petition. The government first states (Br. 16) that "the court treated CIG's claim as amounting to one of actual monopolization . . . ." This simply is not true. The court of appeals did *not* treat the case as one of actual monopoly; rather, it held that petitioner could not prevail on its attempted monopolization claim because of its "failure to show [one of the elements of attempted monopolization, namely] a dangerous probability of successful monopolization." Pet. App. 20a. In the Tenth Circuit's interpretation (*id.* at 20a-24a) of this element of attempted monopolization, "proximity to monopolistic status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market." *Id.* at 22a. The court of appeals then held that there was "no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System" and thus no reasonable chance "that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System *with sufficient market share to be a monopolist.*" *Id.* at 23a (emphasis added); see also *id.*

at 22a (citing cases from the Seventh and Eighth Circuits for the proposition that "50% market share insufficient to show dangerous probability of successful monopolization"); *id.* at 21a n.18.[1]

The Solicitor General's related assertion that by treating the claim as one of actual monopolization, the Tenth Circuit "necessarily determined that CIG had failed to prove that the Trailblazer System had the power to exclude competition and control prices, *i.e.*, monopoly power" (Br. 16) is equally erroneous. The government does not cite any statement in the opinion below as support, and no support can be found. The court of appeals neither stated the standard for proving actual monopolization nor cited any cases involving actual monopolization. What is —and remains—astonishing about the court of appeals' decision is that in the course of explaining why CIG failed to prove a dangerous probability of successful monopolization, the court of appeals accepted without question facts that are themselves sufficient to prove actual monopolization. The court of appeals found *both* that Natural had the "*ability to exclude* CIG" from competing for 13% of the market (Pet. App. 23a) (emphasis added), *and* that this exclusion gave Natural "the *ability to charge supracompetitive prices*" to producers in the Overthrust for seven years, after which "the Trailblazer System would be *helpless to compete against the unused and inexpensive capacity* of CIG's system." *Id.* at 27a (emphasis added).[2]

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[1] The government's related assertion (Br. 16) that CIG does not dispute the Tenth Circuit's characterization of its claim as one for actual monopolization is galling. Until the government's brief, no one had even proposed reading the court of appeals' opinion in this way. CIG's point is simply that the court of appeals accepted, as true, facts that would be sufficient to prove actual monopolization, making more stark that the Tenth Circuit erred in holding that as a matter of law CIG failed to show a dangerous probability of achieving a high market share.

[2] Conspicuously absent from the Solicitor General's attempt to cast doubt upon whether NGPL's exclusionary conduct forced producers and consumers to bear the cost of supracompetitive trans-

If, as the government now suggests, the court of appeals had meant to apply the standard for actual monopolization, it could never have made these findings.

We emphasize, therefore, that the court of appeals did not hold that CIG failed to prove actual monopoly. No amount of rereading or reinterpreting by the United States can disguise the fact that the court of appeals squarely held—based on "market share statistics" alone (*id.* at 24a)—that CIG failed to prove one element of *attempted* monopoly, a dangerous probability of success.[3]

2. The court of appeals' holding therefore squarely conflicts with two lines of decisions in the courts of appeals. First, it conflicts with the established position of the Ninth and Eighth Circuits that all elements of attempted monopolization—including dangerous probability of success—may be proved solely through evidence of unambiguously predatory conduct, without regard to the level of market share.[4] Second, it conflicts with cases in

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portation prices is any mention of the facts that: (1) the District Court squarely held that the record contained evidence from which a jury could conclude that "prices actually increased" (Pet. App. 52a-53a, 40a); (2) the record is replete with such evidence (*e.g.*, Tr. 1715, 1865-66); and (3) one of the producers who was forced to pay these prices has filed a brief in support of the petition (see Br. of Union Pacific Resources Co. as *amicus curiae*). That the jury was not asked to make specific findings of such pricing is not surprising —this was, after all, an *attempt* case.

[3] The remainder of the court of appeals' antitrust discussion (Pet. App. 24a-28a) sets forth the view—which the United States concedes is incorrect (Br. 18-19)—that six years of supracompetitive pricing is insufficient to state a claim under Section 2. Regardless of whether this discussion was necessary to the holding, it is absolutely clear that the discussion that precedes it did not treat CIG's claim as one of actual monopolization.

[4] *E.g.*, *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) ("in the absence of proof of relevant market and market power, the plaintiff must prove either predatory conduct or a per se violation of § 1 to prove an attempt to monopolize"); *Twin City Sportserv., Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.), *cert. denied*, 459 U.S. 1009

the Fifth and Second Circuits holding that both attempted and actual monopolization may be proved with a market share of 50%.[5] Notably, the United States does not dispute petitioner's statement of the law in these circuits (see Br. 18, 20); it argues only that the Tenth Circuit did not treat this case as one involving attempted monopolization, and this argument is simply untenable.

3. The only remaining issue, then, is whether this case is an appropriate vehicle to take up these circuit splits. The United States offers three cryptic assertions why it is not. First, the government restates its view that "the court of appeals treated CIG's antitrust claim as alleging actual monopolization," (Br. 20) which is simply wrong, as the foregoing argument and the plain language of the opinion (Pet. App. 20a-24a) establish.

Second, the government states that "CIG's claim arises in a particular regulatory context in which relevant

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(1982) (predatory conduct "in itself" is sufficient); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 504-05 (9th Cir. 1977) ("market share approaching monopoly is not required"), *cert. denied*, 434 U.S. 1040 (1978); *Portland Retail Druggists Ass'n* v. *Kaiser Found. Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981), *cert. denied*, 469 U.S. 1229 (1985) (same); *Thurman Indus., Inc.* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (9th Cir. 1989) (same); *Blanton* v. *Mobil Oil Corp.*, 721 F.2d 1207, 1214 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985) (same); *H.J., Inc.* v. *International Tel. & Tel. Corp.*, 867 F.2d 1531, 1540-43 (8th Cir. 1989) (following *Twin City*); *Conoco Inc.* v. *Inman Oil Co.*, 774 F.2d 895, 904-05 & n.6 (8th Cir. 1985); *Trace X Chemical, Inc.* v. *Canadian Indus., Ltd.*, 738 F.2d 261, 265 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

[5] *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Domed Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 490-91 (5th Cir. 1984) (citing cases from several circuits finding attempt with less than a 50% market share); *Hayden Publishing Co.* v. *Cox Broadcasting Corp.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984); *Broadway Delivery Corp.* v. *United Parcel Serv., Inc.*, 651 F.2d 122, 130 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981).

legal principles may not apply in the same manner that they would to firms in other market contexts." (Br. 20). The United States does not say, however, what these inapplicable "relevant legal principles" might be. In fact, this Court, in ordering divestiture of the acquisition of one natural gas company by another, has expressly recognized the threat to competition posed by the elimination of competition "in the natural gas field." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 661-62 (1964). Furthermore, because "the proper balance between competition and regulation has proven difficult to establish," the American Bar Association Section of Antitrust Law Task Force recently urged the Administration to undertake "vigorous antitrust scrutiny" under Section 2 and be "particularly sensitive to competitive conditions in the newly deregulated industries." ABA Report on the Antitrust Division of the Department of Justice, 58 Antitrust L.J. 747, 767 (1989). In addition to the *amicus* support of the Attorney General of the State of Colorado, the attorneys general of nine states have sent letters to the Department of Justice in recent months encouraging the Department to support review of the decision below. *See, eg.*, App. 1a-3a, *infra.*

Finally, the government suggests that "this case has an unusual (if not unique) factual context" (Br. 20). But—and this, petitioner submits, is critical—the government does not suggest any way in which these supposedly unique facts affect the application of antitrust legal principles. Specifically, the government first states that here "the alleged predatory conduct is the manipulation of rights created by contract between the plaintiff and the defendant." *Id.* There is no rule, however, that immunizes parties from antitrust liability when their exclusionary conduct involves contract manipulation; in fact, the Ninth Circuit has held that such manipulation is sufficient *in itself* to violate Section 2. *Twin City Sportserv., Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.), *cert. denied*, 459 U.S. 1009

(1982). Second, the government states that here "the plaintiff has a share in the entity on which the defendant is alleged to have conferred monopoly power." Br. 20. This fact conceivably might have been relevant to the calculation of *damages* if CIG had profited in some way from NGPL's action (which it did not), but it is entirely and obviously irrelevant to the legal question about the standard for proving attempted monopolization.

In summary, the United States has ignored the Tenth Circuit's opinion in recommending that a concededly important issue not be reviewed. Its reading is indefensible and offers no principled basis for this Court to avoid resolving a fundamental issue of antitrust law. There is no doubt that the Tenth Circuit treated this case as an attempt case, and no doubt that the Ninth Circuit and the Eighth Circuit would have applied a different standard of "dangerous probability of success" and would have affirmed petitioner's antitrust judgment. This Court should take this opportunity to resolve the 25 years of circuit conflict over the standard for attempted monopolization.

II.

The Solicitor General does not defend the clear holding of the Tenth Circuit that preemption in this case is appropriate because FERC's order requires breathing room. Pet. App. 12a. Instead, the government proposes a strained application of the filed rate doctrine, which does not serve as an adequate alternative basis for holding CIG's contract claim preempted and does not even eliminate the conflict among the courts of appeals on this issue. Accordingly, the court should review the Tenth Circuit's analysis on its face and accept the Solicitor General's concession that the court of appeals' implied preemption holding warrants review.

The Solicitor General's filed rate analysis is unassailable as far as it goes. That analysis fully explains why FERC did not intend to allow CIG to enforce the con-

tract's minimum bill provision in the state law claim for simple breach. Preempting a simple breach of contract action is necessary to effect the essential purpose of FERC's order, which was to eliminate the anticompetitive element in these contracts. In this way, purchasers such as NGPL could buy other gas at lower prices and pass the savings on to gas consumers. FERC clearly intended to confer this right to breach the contract upon NGPL and a state law action to recover damages would directly frustrate FERC's order. Thus, under well-settled preemption principles, a simple breach of contract claim would conflict with that order.

But the Solicitor General makes absolutely no effort to explain why FERC also would intend in that same order to preempt a claim that NGPL has acted in bad faith by refusing to purchase low-cost gas available under that contract so that it could purchase more expensive gas for no reason except to harm a competitor. There is no apparent federal interest in immunizing bad faith conduct injuring a competitor that leads to higher gas prices in the wholesale market. Thus, allowing the State of Colorado to enforce its laws protecting that competitor does not conflict with any FERC order.[6]

For this reason, the Solicitor General is ultimately required to take precisely the same position as the Tenth

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[6] The Solicitor General adopts an incredibly wooden analysis of preemption in this context: FERC adopted an order restricting the costs NGPL must pay; this state law contract action allows CIG to recover additional costs; therefore, the state law action must be preempted. But this analysis presumes that any state law action that bears any relation to a "filed rate" is preempted, which is only true under the court of appeals' implied-preemption, breathing-room theory. There is no actual conflict between recovery for bad faith under state law and the filed rate. The recovery is based solely on the filed rate for gas that would have been taken in good faith and nothing in the federal order purports to grant NGPL the "right" to act in bad faith breach. Thus, there is no inconsistency in the obligations imposed upon NGPL and the state law recovery does not interfere with Congress' or the FERC's purposes in eliminating claims for simple breach.

Circuit, which is that there is implied preemption. Thus, the government finds preemption in the fact that in its order FERC "drew no such distinction" between simple and bad faith breach of contract and that the Commission later "declined to alter its ruling." Br. 14, 15. But those are merely different ways of stating what the court of appeals held, viz., that the state law claim can be preempted based on FERC's silence in order to provide the filed rate with "breathing room." Because the United States concedes that petitioner's argument on this point has "considerable force," review by this Court remains clearly warranted.

Even if the Solicitor General's preemption analysis were sound, the issue still would warrant review because of the conflict between the holding of the Tenth Circuit (even under the Solicitor General's theory) and the holding of the Fifth Circuit in *Gulf States Utils. Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). In *Gulf States* the court acknowledged that "[t]he FPA" . . . preempts *some* private causes of action for breach of contract (*id.* at 1471; emphasis added), particularly those "contract" claims in which recovery of damages would require calculation of a *rate* different than set by FERC. Nevertheless, the Fifth Circuit held that a utility's claim for "breach of an independent duty to act in good faith" was not preempted by the Federal Power Act or by the filed rate doctrine. *Id.* at 1469, 1474. The Solicitor General simply does not address the fact that in *Gulf States*—as here—the injured party claimed that "good faith" conduct "would have [affected] the *amount purchased* (not the rate)," and the court therefore ruled that "[t]his claim would not be preempted by the FPA." *Id.* at 1471 (emphasis in original). The Tenth Circuit's holding squarely conflicts with *Gulf States* and nothing the Solicitor General has argued eliminates that conflict.[7]

[7] The Solicitor General quotes from the portion of the *Gulf States* opinion that focuses on claims seeking a different rate and

CONCLUSION

For the reasons set forth above and those stated in the petition and reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 24, 1990

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ignores the relevant portion of the opinion which protects state law claims based on the amount of energy consumed. Because the claim here is that NGPL would have purchased more gas at the filed rate, this is precisely the type of claim the Fifth Circuit approved.

APPENDIX

APPENDIX

STATE OF ILLINOIS
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Attorney General

July 20, 1990

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RE: *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co.*, No. 89-1508, petition for certiorari pending

Dear Mr. Rill:

I have requested the State Attorneys General to join me in writing to you to inform you of my interest in the above-referenced petition for a writ of certiorari, in which the Supreme Court has called for the views of the United States. I understand that you have been asked to make a recommendation to the Solicitor General concerning the proper disposition of the petition. In making that recommendation, I hope that you will take into account my strong interest in the enforcement of Section 2 of the Sherman Act.

In this case, the verdict for plaintiff on the Sherman Act Section 2 attempted monopolization claim was based on proof that the defendant had engaged in "predatory" conduct that had enabled it to increase its market share to 54% while forcing natural gas customers to pay supracompetitive prices. *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co.*, 885 F.2d 683, 692-696 (1989).

The Tenth Circuit reversed the verdict on the ground that the defendant would be unlikely to achieve the 70% to 80% market share the court believed necessary to achieve monopoly status. The court of appeals also held that the verdict was in error because the defendants' ability to charge supracompetitive prices would expire after six years. *Id.*

As you know, the Colorado Attorney General, together with the Public Service Company of Colorado, the City and County of Denver and the City of Colorado Springs, filed an *amicus* brief in support of the petitioner. These *amici* expressed their concern that the decision of the Tenth Circuit under review "undermines the antitrust law's protection against monopolization and supracompetitive pricing." Br. at 2. The decision "undermines *amici*'s interest in promoting the unequivocal policy of competition which is the essence of the Sherman Act." *Id.* at 8. As consumers—and, more important, as parties charged with enforcing the antitrust laws on behalf of consumers in our *parens patriae* role—I share that concern.

Under the decision below, a state attorney general bringing an attempted monopolization claim could not sustain a verdict—even with evidence of exclusion of lower-cost competitors and higher prices to consumers—absent proof that the defendant would eventually achieve a 70%-80% market share that could be sustained for more than six years. Such a rule would seem to make it virtually impossible ever to bring a successful attempted monopolization claim.

I strongly believe that this case is appropriate for certiorari. The record is clear and the findings of fact in the lower courts are well-supported by that record. Moreover, as the petition for certiorari demonstrates, the Tenth Circuit's decision creates or exacerbates several conflicts among the circuits on the issues presented.

In sum, the petition raises issues of fundamental importance to states' efforts to achieve sound enforcement of the Sherman Act's prohibition against attempts to monopolize. The patchwork of conflicting rules among and within the circuits impairs our ability to formulate policy and to undertake uniform enforcement decisions. I strongly urge you to take these interests into account when the Department makes its recommendations to the Supreme Court.

Thank you for your attention to this matter.

Sincerely,

NEIL F. HARTIGAN
Attorney General
State of Illinois

cc: Kenneth Starr
Solicitor General of the United States